Supreme Court, U.S.
FILED
APR 8 - 2004
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No. 02-1192

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

AVIALL SERVICES, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a party that is "potentially responsible" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, and that voluntarily remediates a contaminated site, can sue under CERCLA to recover its response costs from other potentially responsible parties.

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BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a party that engages in the voluntary remediation of hazardous waste may sue under CERCLA to recover cleanup costs from other responsible parties. *Amicus* has a significant interest in the correct resolution of this question because—consistent with one of CERCLA's principal objectives—it has initiated voluntary remediation activities at several sites throughout the United States and could be left without an effective mechanism to recover even a portion of its cleanup costs if the decision below were reversed.

Lockheed Martin Corporation is one of the world's leading advanced technology companies. Approximately eighty percent of Lockheed Martin's business is with the United States Department of Defense and various federal agencies and includes aeronautical research and development, the manufacture of tactical aircraft and strategic missile systems, the development of space launch and satellite programs, and other projects closely related to the Nation's defense. In connection with this work, Lockheed Martin owns or operates a number of facilities that were formerly owned or operated by the federal government or at which work is performed pursuant to government contracts.

Lockheed Martin has expended millions of dollars implementing voluntary remediation programs at several of these facilities in reliance upon its right under CERCLA to recover response costs from other responsible parties—

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

including the federal government. Lockheed Martin is concerned that if such a recovery right were deemed to be unavailable, the incentive to engage in voluntary cleanups would be significantly reduced and companies that engage in voluntary remediation activity unjustly and unjustifiably would be forced to bear costs that are in large part attributable to other parties.

STATEMENT

1. In 1981, Aviall Services, Inc. ("Aviall") purchased from Cooper Industries, Inc. ("Cooper") four facilities at which Cooper had serviced and maintained aircraft engines. Pet. App. 48a. After the acquisition, Aviall continued to operate this business and discovered that both it and Cooper had contributed to contamination at the facilities. *Id.* Aviall promptly notified the Texas Natural Resource Conservation Commission ("TNRCC"), which informed Aviall that it was in violation of state environmental laws and directed Aviall to initiate cleanup activity. *Id.* Although the TNRCC threatened to pursue an enforcement action if Aviall failed to implement a remediation program, neither it nor the United States Environmental Protection Agency ("EPA") has taken judicial or administrative measures under CERCLA to compel cleanup. Pet. App. 48a-49a.

In 1984, Aviall voluntarily began remediation of the facilities (Pet. App. 48a) and to date has incurred approximately $5 million in cleanup costs (Jt. App. 36a). Aviall has since sold the facilities but remains contractually obligated to complete the cleanup, the eventual cost of which is estimated to be $21 million. Pet. App. 48a; Jt. App. 36a.

2. In 1997—while the cleanup was underway—Aviall sued Cooper in the United States District Court for the Northern District of Texas seeking to recover response costs under Sections 107(a) and 113(f)(1) of CERCLA and state law. Section 107(a)(1)-(4) of CERCLA imposes strict liability on four categories of parties—owners, operators, disposers, and transporters—that contribute to the release of hazardous waste. 42 U.S.C. § 9607(a)(1)-(4). Section

107(a)(4)(A)-(D) makes these "covered persons" liable for, among other things, "*any* . . . necessary costs of response incurred by *any* . . . person." 42 U.S.C. § 9607(a)(4)(B) (emphases added).[2] Section 113(f)(1) authorizes parties to seek contribution from other potentially responsible parties "during or following" an enforcement action under Section 106 or 107(a) and provides that "[n]othing . . . shall diminish the right of any person to bring an action for contribution in the absence of" an action under those sections. 42 U.S.C. § 9613(f)(1).

Aviall pleaded its suit in a manner consistent with the view—expressed by the United States for more than a decade—that CERCLA "authorizes private persons to bring actions to recover response costs which they incur at a site, whether those actions are taken under compulsion by EPA or voluntarily." U.S. *Amicus* Br. at 3-4, *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994) (No. 92-3820) (discussed *infra*). Its suit also conformed to Fifth Circuit precedent, which holds that a CERCLA contribution action arises jointly through the operation of Sections 107(a) and 113(f)(1). *See Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 924 (5th Cir. 2000).

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[2] Covered persons are liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 104(i).

42 U.S.C. § 9607(a)(4)(A)-(D). The national contingency plan referenced in subparagraph (B) consists in part of regulations promulgated by the EPA to implement CERCLA. *See* 40 C.F.R. pt. 300.

3. Cooper moved for summary judgment on Aviall's CERCLA claim on the ground that Aviall could not seek contribution because it had not first been made the subject of a civil action under Section 106 or 107(a). The district court agreed and entered summary judgment for Cooper, explaining that under its interpretation of Section 113(f)(1) a "plaintiff is precluded from seeking contribution" if it "cannot allege any prior or pending CERCLA enforcement action against it." Pet. App. 97a.[3]

A divided panel of the Fifth Circuit Court of Appeals affirmed. The majority emphasized the limitations seemingly embodied in the language of Section 113(f)(1)'s first sentence—its enabling clause—and concluded that this provision requires a potentially responsible party ("PRP") "seeking contribution from other PRPs to have filed a § 113(f) claim 'during or following' a federal CERCLA action against it." Pet. App. 52a. The panel opined that "Congress wanted only a limited right of contribution" that did not "go beyond the traditional common law definition of contribution." Pet. App. 65a. The panel also surmised that its interpretation would not discourage voluntary cleanups because parties "may" be able to "rely on state environmental laws to recover costs." *Id.*

Judge Wiener dissented, resting his analysis upon the final sentence of Section 113(f)(1)—its saving clause—which states that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107." 42 U.S.C. § 9613(f)(1). Whereas the majority read this clause as merely preserving *state-law* contribution claims, Judge Weiner explained that he "read the savings clause to mean precisely what it says"—*i.e.*, that Aviall could bring its contribution claim because "[n]othing" in Section 113(f)(1)

[3] Having entered summary judgment for Cooper on Aviall's CERCLA claim, the district court declined to exercise supplemental jurisdiction over Aviall's state-law claims. Pet. App. 99a.

diminishes the right of a PRP to bring a contribution action at any time. Pet. App. 75a.

4. On rehearing *en banc*, the Fifth Circuit reversed the panel decision. Unlike the panel, the *en banc* court concluded that Aviall's suit was not precluded by the "during or following" language of Section 113(f)(1)'s enabling clause. Instead, it explained that "Section 113(f)(1) authorizes suits in *both* its [enabling clause] and [savings clause]." Pet. App. 14a (emphasis added). The court rejected the view that the savings clause preserves only state-law claims, and—citing this Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994)—concluded that the savings clause *also* "preserve[s] contribution actions arising by federal common law under § 107." Pet. App. 26a. Because the Section 107(a) contribution actions preserved by Section 113(f)(1)'s savings clause need *not* be brought "during or following" a CERCLA enforcement action, the court reasoned, "a PRP may sue at any time for contribution under federal law." Pet. App. 14a.

The *en banc* court emphasized that its decision comports with Section 113(f)(1)'s legislative history and that a contrary decision would undermine the principal objectives of CERCLA "by slowing the reallocation of cleanup costs from less culpable PRPs to more culpable PRPs and by discouraging the voluntary expenditure of PRP funds on cleanup activities." Pet. App. 31a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that CERCLA authorizes Aviall's suit against Cooper. Section 107(a) of CERCLA imposes liability on any potentially responsible party for "the necessary costs of response" incurred by any other potentially responsible party. As this Court recognized in *Key Tronic*, 511 U.S. at 816, and as the United States has advised the lower courts for more than a decade, that section creates an implied right of action authorizing PRPs to sue other PRPs for response costs.

Far from precluding Aviall's suit, as contended by Cooper and the government, Section 113(f)(1) expressly preserves Aviall's Section 107(a) action in these circumstances. Although Section 113(f)(1)'s *enabling* clause contemplates the availability of contribution claims "during or following" Section 106 and 107(a) civil actions, Section 113(f)(1)'s *savings* clause makes clear that contribution actions need *not* be brought exclusively "during or following" such proceedings. Rather, as the court of appeals correctly observed, the savings clause *preserves* the independent rights of action that are authorized by Section 107(a). Pet. App. 26a. Because Aviall's suit arises under Section 107(a), its claim falls within Section 113(f)(1)'s savings clause, and the "during or following" limitation in the first sentence of Section 113(f)(1) does not impose a barrier to Aviall's suit.

Permitting PRPs to recover voluntarily incurred cleanup costs is consistent with CERCLA's purpose and legislative history. At the time Section 113(f)(1) was enacted in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), it was well-established that "voluntary" remediators—that is, parties undertaking cleanup in the absence of an action under Section 106 or 107(a)—possessed contribution rights against other PRPs. Nothing in SARA purported to alter or abridge those rights. On the contrary, SARA was enacted precisely *because* Congress recognized that enforcement action by the EPA alone could not effectively vindicate CERCLA's goals. Section 113(f)(1) was enacted to encourage voluntary cleanups in the private sector by confirming and preserving the right of PRPs to recover response costs from other PRPs. Suits like Aviall's thus accomplish *precisely* what Congress intended.

A rule precluding PRPs from recovering voluntarily incurred response costs under CERCLA would have consequences that are dramatic and unfair. Voluntary remediation efforts would be brought to a halt, and at sites at which cleanup is underway, PRPs would refuse to incur additional response costs until the federal government initiated an enforcement action giving rise to contribution rights. The federal government (which previously advocated the reading of Section 107(a) and 113(f)(1) urged by Lockheed Martin here) also would receive a tremendous windfall from the new position it now urges upon this Court, because the United States is itself a PRP at thousands of sites across the country. Under the rule espoused by Cooper and the United States, no PRP could sue the federal government for contribution unless the government first initiated an enforcement action against that PRP under Section 106 or 107(a). The federal government thus would effectively be given the power to immunize itself against the enormous liabilities it faces in connection with sites that are currently being remediated on a voluntary basis. Such a sweeping enforcement gap would fatally undermine the legislative objectives that prompted the enactment of CERCLA and SARA and would upset the settled expectations of countless companies that have entered into acquisitions or undertaken cleanup efforts in the expectation that—consistent with the government's long-standing representations to the lower federal courts—CERCLA affords them a mechanism to recover their response costs.

ARGUMENT

I. AVIALL'S SUIT IS AUTHORIZED UNDER SECTION 107(a) AND PRESERVED BY SECTION 113(f)(1)'S SAVINGS CLAUSE.

Section 107(a) imposes liability on—and confers a private cause of action against—parties such as Cooper that formerly conducted activities that contributed to the release of hazardous waste. Aviall's complaint pleaded a claim against Cooper under Section 107(a). Because that Section expressly authorizes contribution suits even in the absence of a pending government enforcement action under Section 106 or 107(a), Aviall's suit against Cooper is authorized under CERCLA.

A. Aviall's Cause Of Action Originates Under Section 107(a).

1. As this Court has repeatedly observed, "[w]hen interpreting a statute, we look first and foremost to its text." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994). That principle is dispositive here because the plain language of Section 107(a) authorizes *any* person who has engaged in the remediation of hazardous waste—*including* a PRP such as Aviall—to recover its cleanup costs from *any* "covered person." 42 U.S.C. § 9607(a)(4)(B). Because Aviall's suit falls squarely within the scope of private suits authorized by Section 107(a), this case can begin—and end—with a straightforward application of that provision.

This Court has expressly recognized that Section 107(a) authorizes potentially responsible parties to sue other PRPs to recover voluntarily incurred response costs. In *Key Tronic Corp. v. United States*, 511 U.S. 809, this Court held that Key Tronic could recover initial response costs from the Air Force in a suit under Section 107(a). Even though Key Tronic and the Air Force had both contributed to contamination (thus making each a PRP), and even though Section 113(f)(1) already had been enacted, no member of this Court (nor the federal government) so much as questioned the availability of a Section 107(a) claim to a PRP seeking response costs from other PRPs. *See id.* at 811.

Instead, the focus of the Court's analysis was directed to whether Section 107 "*impliedly* authorizes private parties to recover cleanup costs from other PRPs," as the majority held (*id.* at 818 (emphasis added)), or whether it *expressly* did so—as the dissenters urged. *Id.* at 822 (Scalia, J., dissenting) (under the "plain language" of Section 107(a)(4)(B), "a party who has incurred costs to clean up a hazardous waste site can recover those costs from any other party liable under CERCLA"). But every Justice agreed that Section 107(a) authorizes a PRP to recover response costs "from other PRPs." *Id.* at 818. The *Key Tronic* Court fully recognized that Section 113(f)(1) separately authorizes contribution actions, but it had little trouble harmonizing Sections 107(a) and 113(f)(1) through the observation that in light of the 1986 SARA amendments "the statute now expressly authorizes a cause of action for contribution in § 113 *and impliedly authorizes a similar and somewhat overlapping remedy in § 107*." *Id.* at 816 (emphasis added).[4]

Key Tronic's holding is particularly significant because the "response costs" for which Key Tronic sought recovery under Section 107(a)—and to which this Court *held* Key Tronic was entitled—were incurred voluntarily, in that Key Tronic expended them independently from the enforcement actions that the EPA and state regulators initiated against it. Although Key Tronic and the Air Force later entered into settlements with the EPA to resolve their respective CERCLA liabilities to the United States, Key Tronic's claim under Section 107(a) sought recovery of legal fees it *voluntarily* incurred in identifying other PRPs—response costs that had nothing to do with the payment Key Tronic later made in its federal settlement. Thus, no meaningful distinction can be drawn between the "voluntariness" of the response costs incurred by Key Tronic and the response costs incurred by Aviall here.

In light of Section 107(a)'s plain text and this Court's decision in *Key Tronic*, there can be no serious dispute that Section 107(a) grants a private cause of action against "cov-

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[4] The government refers to *Key Tronic*'s conclusion that PRPs can sue other PRPs under Section 107(a) to recover response costs as "passing dictum." U.S. *Amicus* Br. at 20 n.9. But that is incorrect. The *holding* in *Key Tronic* is that a PRP can pursue a Section 107(a) action against another PRP to recover certain attorneys' fees incurred in connection with cleanup activity. The Court's conclusion that Section 107(a) impliedly authorizes suits by PRPs against other PRPs obviously was necessary to this result and thus cannot be described as "dictum" even under the broadest interpretation of that term. *See California v. FERC*, 495 U.S. 490, 501 (1990) (an issue of statutory interpretation addressed by this Court is not dictum where it is "necessary for, and integral to" the Court's holding).

ered persons" to *any* person—including a PRP—who has incurred response costs, and that such a cause of action exists apart from the first sentence of Section 113(f)(1). Indeed, such an "extrinsic" cause of action is expressly saved by the last clause of Section 113(f)(1). No one disputes that Cooper falls within the statutory definition of a "covered person" or that Aviall has incurred response costs. Section 107(a) therefore expressly affords Aviall the right to recover its cleanup costs from Cooper, and the decision below can be affirmed on that basis.

2. Cooper and the government go to great lengths to suggest that in the district court Aviall somehow "abandoned" its claim under Section 107(a). But this is a demonstrably incorrect reading of the record. *See* Br. Opp'n Pet. Writ Cert. at 1-2.

To begin with, the Second Amended Complaint (the operative pleading) states on the first page that "[t]his is a civil action, under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.* . . . seeking . . . reimbursement of certain investigation and remediation costs." Jt. App. 48a. Aviall expressly captioned its fifth cause of action "Liability under CERCLA" and referenced both Sections 107(a) and 113(f)(1). Jt. App. 62a-63a. The operative pleading on its face thus makes clear that Aviall has sued "under" Section 107(a) of CERCLA and refutes the strained suggestion that Aviall "abandoned" that claim.

Cooper and the government premise their waiver argument on the supposition that in its first and second amended complaints Aviall "omitted" a freestanding cause of action under Section 107(a) that had appeared in the original complaint. Cooper Br. at 3 & n.1; U.S. *Amicus* Br. at 21 n.10. But as Aviall has consistently maintained, the amended complaints did not abandon—and were not designed to abandon—an independent cause of action under Section 107(a). Instead, the complaint was amended to plead the contribution cause of action in the manner prescribed by Fifth Circuit law,

which maintains that a cause of action for contribution arises under Section 107(a) but is governed by Section 113(f)(1)'s "procedural framework." *See Geraghty & Miller*, 234 F.3d at 924 ("[W]hile section 113(f) is the vehicle for bringing a contribution action, it does not create a new cause of action or create any new liabilities. Rather, it is a mechanism for apportioning costs that are recoverable under section 107.").

By pleading its claim under CERCLA in this manner, Aviall did not "abandon" its claim under Section 107(a). Nothing required Aviall to plead its contribution claim in a manner inconsistent with controlling Fifth Circuit precedent. As this Court has observed, it is "unreasonable" to "impose, as an absolute condition to [this Court's review of] an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent." *United States v. Williams*, 504 U.S. 36, 44 (1992). Indeed, *Williams* reflects this Court's acceptance of an anti-waiver argument advanced by the United States to preserve *its* ability to seek reversal of circuit precedents with which it seemingly had agreed in the courts below. *See id.* Similarly, Aviall should not be taxed with "waiver" for conforming its pleadings to controlling law.

Furthermore, the "waiver" claim advanced by Cooper and the government cannot be reconciled with how each interprets the interplay of Sections 107(a) and 113(f)(1). It is well-established that the cause of action available to one PRP to sue another PRP arises under Section 107(a).[5] The language of CERCLA itself expressly references the fact that Section 107(a) is the authorizing provision for contribution

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[5] *See Sun Co. v. Browning Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) ("It is thus clear that . . . a § 113(f) action for contribution *is* an action under § 107") (internal quotation marks and citation omitted) (emphasis in original); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997) ("Section 113(f) . . . does not create the right of contribution—rather the source of a contribution claim is section 107(a).") (citation omitted).

actions. *See* 42 U.S.C. § 9613(h)(1) (referring to an "[a]ction *under Section 107* to recover response costs or damages *or for contribution*") (emphases added). Indeed, Cooper and the government *concede* that Section 107(a)—not Section 113(f)(1)—creates *all* CERCLA contribution rights. *See* Cooper Br. at 25; U.S. *Amicus* Br. at 20-21.[6] It is difficult to credit any suggestion that Aviall "abandoned" a claim under Section 107(a) when that provision is *conceded* by petitioner and its *amicus* to be the source of Aviall's right to sue in these circumstances.

Moreover, Aviall expressly argued in the court of appeals that if the court were to conclude that Section 113(f)(1)'s "during or following" limitation barred its claim, its suit should be permitted to proceed independently under Section 107(a). *See* Aviall Resp. Br. at 24 ("[P]arties who are excluded from seeking contribution under section 113(f)(1) must therefore have available to them the broader right of cost recovery under section 107(a)."); Aviall Supplemental Br. at 24 (same). Because Aviall asserted its claim under Section 107(a) below, it may properly rely upon that ground to defend the lower court's judgment before this Court. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised

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[6] *See also* Oral Argument Transcript, *Key Tronic*, No. 93-376, 1994 WL 664971, at *23-24 (Mar. 29, 1994) (statement of Deputy Solicitor General Wallace) ("We do not contest that there is an implied cause of action under 9607 to recover contribution of costs. And that was confirmed by Congress in adding a contribution provision in the 1986 amendments in 9613, but that does not itself provide the cause of action; it provides *guidelines* for the cause of action.") (emphasis added); U.S. *Amicus* Br. at 11, *Pinal Creek* (No. 97-795) ("The court of appeals correctly recognized that Sections 107 and 113 work together—the first section *creating* the claim for contribution between PRPs, and the second qualifying the nature of that claim.") (internal quotation marks omitted) (emphasis added).

below, so long as that party seeks to preserve, and not to change, the judgment.").[7]

3. In an equally unavailing attempt to dissuade the Court from affirming based upon the plain meaning of Section 107(a), Cooper and the government assert that courts have "uniformly" determined that PRPs are not permitted to seek response costs from other PRPs under Section 107(a). Cooper Br. at 34-35; U.S. *Amicus* Br. at 6. These arguments obviously ignore this Court's contrary conclusion in *Key Tronic* and in any event are indefensible on their own terms.

Contrary to the claims of Cooper and the government, there is nothing remotely close to a "uniform" conclusion in the circuits that a PRP that has voluntarily incurred response costs is precluded from suing other PRPs under Section 107(a). Indeed, several courts have expressly recognized that a PRP that has voluntarily undertaken cleanup *can* pursue a Section 107(a) cost-recovery action against other responsible parties. *See, e.g., Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993) (Posner, J.) (PRP could pursue a Section 107(a) claim against another PRP because "the statute permits one responsible person to recover all or part

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[7] In any event, this Court has made clear that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991) (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). As *Kamen* made clear, in those rare cases in which it is appropriate to apply a "truncated body of law" as a "sanction" for a party's failure to rely on favorable law, a court should *never* issue an opinion that might be construed by lower courts and other parties as "binding precedent" on the waived points. *Id.* at 100 n.5. Here, if Cooper were correct that waiver *has* been established (it is not), this case would become nothing but a fact-bound inquiry into the effect of such a purported waiver on the rights of two particular, identified PRPs. Thus, any construction of the scope of contribution rights under Section 113(f)(1) premised on the waiver of Aviall's claim under Section 107(a) would render this case unworthy of this Court's attention, and therefore should lead to dismissal of the writ.

of its response costs from another"); *In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir. 1993) ("[I]n the event the private-action plaintiff itself is potentially 'liable' to the EPA for response costs, and thus is akin to a joint 'tort-feasor,' section 9607(a)(4)(B) serves as the *pre-enforcement* analog to the 'impleader' contribution action permitted under section 9613(f)."') (emphasis in original); *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221 (E.D. Pa. 1995) (a PRP that voluntarily engages in cleanup may pursue other PRPs under Section 107(a)).[8]

Moreover, the government itself has repeatedly brought suit under Section 107(a) in circumstances in which it is a PRP, and there is nothing in the text of Section 107(a) or elsewhere in CERCLA that would afford the federal government a broader remedial right than what is available to private parties. *See United States v. Wallace*, 961 F. Supp. 969, 975 (N.D. Tex. 1996) ("potential liability for contribution does not affect the government's right to full recovery of its response costs" in a Section 107(a) action); *United States v. Hunter*, 70 F. Supp. 2d 1100, 1108 (C.D. Cal. 1999) (same).

To be sure, several courts have held that a PRP cannot sue other responsible parties under Section 107(a) for *joint and several* liability. *See* U.S. *Amicus* Br. at 6 n.2. But that question is fundamentally distinct from the question whether a PRP can sue under Section 107(a) for *contribution*. No court has held that Section 107(a) precludes a contribution action by a voluntary remediator against other PRPs. Indeed, only one court—the Ninth Circuit—has squarely held that Section 107(a) suits are unavailable to voluntary remediators (*see Pinal Creek*, 118 F.3d at 1302), but in that case the

[8] The question also has been expressly left open by several courts. *See, e.g., Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 352 n.10 (6th Cir. 1998) ("This case does not involve a PRP who initiated cleanup voluntarily without any governmental prodding, and we express no opinion with regard to such a party's right to seek joint and several cost recovery [under Section 107(a)].").

plaintiff PRPs sought to impose joint and several liability, and the Ninth Circuit already had decided that a voluntary remediator could pursue a *contribution* action against other PRPs under Section 113(f)(1). *See, e.g., Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 691 (9th Cir. 1992). Thus, the alarmist suggestion that an unbroken line of cases in the lower courts precludes a PRP that has voluntarily incurred response costs from suing other PRPs for contribution under Section 107(a) simply does not withstand scrutiny. Aviall's suit arises under—and is independently authorized by—Section 107(a).

B. Aviall's Claim Is Preserved By Section 113(f)(1)'s Savings Clause.

Nothing in Section 113(f)(1) precludes Aviall's suit. Section 113(f)(1)'s "savings clause" provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107." 42 U.S.C. § 9613(f)(1). As both Cooper and the government correctly recognize, this "savings provision . . . preserve[s] any *independent* right to contribution that exists apart from Section 113(f)(1)." U.S. *Amicus* Br. at 16 (emphasis in original); Cooper Br. at 20 (the savings clause "preserve[s], undiminished, *other* contribution rights that may exist elsewhere," including "federal rights of action for contribution that can be maintained outside Section 113(f)(1)") (emphasis in original). Aviall's cause of action arises under Section 107(a)—a provision that "exists apart from" Section 113(f)(1)—and thus falls squarely within the savings clause.

1. Cooper and the government contend that any construction of Section 113(f)(1) that encompasses Aviall's claim would improperly convert the "savings" clause into an enabling clause. Cooper Br. at 20-21; U.S. *Amicus* Br. at 15-16. But those arguments reflect a fundamental misunderstanding of the function of the last sentence of Section 113(f)(1). As the court of appeals correctly recognized, Section 113(f)(1)'s savings clause "*preserve*[*s*] contribution ac-

tions arising by federal common law under § 107." Pet. App. 26a (emphasis added). Section 113(f)(1)'s last sentence plays the traditional role of a savings clause by preserving claims that arise from sources independent of the enabling clause.

Cooper and the government also assert that the savings clause encompasses only state-law claims because to hold otherwise would allow the savings clause to swallow the enabling clause. But there is no textual basis for the claim that Section 113(f)(1)'s savings clause applies only to state-law claims, and in light of CERCLA's legislative history (reviewed below) there is nothing "anomalous" in according the savings clause its plain meaning in this context.

2. Petitioner and its *amicus* expend much effort arguing that Aviall's suit is not consistent with the traditional understanding of "contribution" and that CERCLA's "contribution" provision therefore does not authorize (or save) Aviall's claim. Cooper Br. 27-29; U.S. *Amicus* Br. 17-19. But the debate about whether Aviall's claim is—or is not—a claim for "contribution" misses the point. If Cooper and the government are correct that Aviall's claim is not an action for "contribution," then Aviall's cost-recovery action under Section 107(a) is entirely *unaffected* by the "during or following" limitation imposed on CERCLA "contribution" actions by the first sentence of Section 113(f)(1). Instead, Aviall's "implied" right under Section 107(a)—the remedy "similar [to] and somewhat overlapping" (*Key Tronic*, 511 U.S. at 816) with the contribution claim authorized by Section 113(f)(1)—would independently authorize Aviall's suit against Cooper, just as it authorized Key Tronic's suit for response costs against the Air Force. And if Aviall's claim is characterized as a claim for "contribution"—as the court of appeals concluded—it is expressly saved by Section

113(f)(1)'s savings clause. Whatever label may be assigned to Aviall's claim, its suit is authorized under CERCLA.[9]

C. Aviall's Suit Is Consistent With CERCLA's Purpose And Legislative History.

CERCLA's objectives and legislative history confirm that a voluntary remediator such as Aviall can sue under CERCLA to recover response costs from other PRPs in the absence of a pending or completed enforcement action.

1. Congress enacted CERCLA to accomplish two goals: "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups." H.R. REP. NO. 253, 99th Cong., 1st Sess., Pt. 3, at 15 (1985). Congress intended both goals to be achieved by promoting *voluntary* cleanup efforts by the private sector—efforts Congress sought to encourage through enactment of the liability and remedial provisions of Section 107(a). The relevant committee reports associated with CERCLA's enactment are replete with statements that Section 107(a)'s strict liability regime was enacted "*to induce persons voluntarily* to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H.R. REP.

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[9] The government invokes the principle that Congress should "not be construed as making any innovation upon the common law which it does not fairly express." U.S. *Amicus* Br. at 19 (citation omitted). But reliance on that principle is misplaced here because "[a]t common law there was no right to contribution among joint tortfeasors." *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 86 (1981). Over time, that rule was modified "by statute or judicial decision" (*id.* at 86-87), such that, at the time CERCLA and SARA were enacted, the right of contribution among joint tortfeasors was almost uniformly accepted. The relevant inquiry is not whether a battle of citations establishes that analogous suits "at common law" were deemed to be actions for "contribution," but rather whether Congress—in enacting CERCLA and the 1986 SARA amendments—intended parties in Aviall's circumstances to sue other PRPs to recover response costs. The statutory text demonstrates that the answer to that question is clearly yes. *See also infra* Part C.

No. 1016, 96th Cong., 2d Sess., at 17 (1980) (emphasis added); *see also* S. Rep. No. 848, 96 Cong., 2d Sess., at 31 (1980) ("This liability standard is intended to induce potentially liable persons to *voluntarily mitigate damages* rather than simply rely on the government to abate hazards.") (emphasis added).[10]

Indeed, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the controlling plurality of the Court recognized that the private cause of action afforded to PRPs by CERCLA "came about only after Congress had tried to solve the problem posed by hazardous substances through other means." *Id.* at 21. Those Justices explained:

> Prior statutes such as the Resource Conservation and Recovery Act of 1976 had failed in large part because they focused on preventive measures to the exclusion of remedial ones. The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.

Id. (citations omitted) (emphasis in original). *Union Gas* went on to explain that the entire purpose of CERCLA's remedial scheme was to encourage voluntary remediation by providing PRPs a cause of action against other PRPs for response costs:

> Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs of its own cleanups of hazardous waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same

[10] *See also* 126 Cong. Rec. 26338 (Sept. 19, 1980) (statement of Rep. Florio) ("[Section 107] accomplishes three objectives. It assures that the costs of chemical poison releases are borne by those responsible for the releases. It creates a strong incentive both for prevention of releases *and voluntary cleanup* of releases by responsible parties.") (emphasis added).

> time. Some help was needed, and Congress sought to encourage that help *by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from other potentially responsible parties.*

Id. at 21-22 (emphasis added).[11]

When Congress took up deliberations on the 1986 SARA amendments, its preoccupation with encouraging voluntary remediation had not dissipated. The committee reports again consistently and repeatedly emphasized that "[v]oluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem." H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 5, at 58 (1985).[12] The unmistakable clarity of the legislative history on this point prompted one court to observe that "the recurring theme of facilitating prompt action to remedy environmental blight . . . [was] echoed . . . with even greater force [in SARA] than [in] CERCLA's original enactment in 1980." *United States v. Monsanto Co.*, 858 F.2d 160, 170 & n.18 (4th Cir. 1988).

2. Against this backdrop, it cannot plausibly be suggested that Aviall's suit is inconsistent with congressional

[11] No Justice disagreed with this analysis. Justice Scalia concurred with the plurality that Congress sought in CERCLA to abrogate the States' sovereign immunity, but he (along with three other Justices) concluded that Congress lacked the power to do so. *See Union Gas*, 491 U.S. at 29 (Scalia, J., dissenting in part). That latter view prevailed in *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996), which reversed *Union Gas* on Eleventh Amendment issues but not on the interpretation of CERCLA set forth above.

[12] *See also* 131 Cong. Rec. 24730 (Sept. 24, 1985) (statement of Sen. Domenici) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

intent. Before Congress amended CERCLA in 1986 by adding Section 113(f)(1), it was firmly established that Section 107(a) afforded a PRP the right to recover voluntarily incurred cleanup costs from other responsible parties. In *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982), for example—the case correctly characterized by the court of appeals as the "seminal" decision (Pet. App. 15a)—the City of Philadelphia sought to recover cleanup costs from companies that had contributed to contamination at a city landfill. The district court recognized that the City itself was potentially liable for response costs but nevertheless held that the City could pursue an action under Section 107(a). *Id.* at 1143; *see also City of New York v. Exxon Corp.*, 633 F. Supp. 609, 616-17 (S.D.N.Y. 1986) (stating, before the enactment of SARA, that the "private recovery provisions of [CERCLA] . . . assure an incentive for private parties, *including those who may themselves be subject to liability under the statute*, to take a leading role in cleaning up hazardous waste facilities as rapidly and completely as possible.") (emphasis added).

A significant number of pre-SARA decisions followed *Stepan Chemical* by expressly holding that PRPs have the right to recover voluntarily incurred cleanup costs under CERCLA. *See Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986); *Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290-91 (N.D. Cal. 1984); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987); *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986); *Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp.*, No. CIV-1-81-389, 1984 U.S. Dist. LEXIS 24317, at *11 (E.D. Tenn. Aug. 16, 1984).

Thus, when Congress added Section 113(f)(1) to CERCLA it was widely understood that PRPs possessed a right to pursue actions under Section 107(a) to recover voluntarily incurred cleanup costs. "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it

expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). Nothing suggests that Congress's decision to enact SARA was in any way prompted by a desire to *curtail* these remedial rights—indeed, nothing in SARA modified Section 107(a). *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of . . . [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). It is immaterial whether Congress believed such cost-recovery claims to be outside the realm of "contribution" and thus directly and independently authorized by Section 107(a),[13] or whether (as the court of appeals concluded) Congress deemed these claims to sound in contribution and affirmatively preserved them through enactment of Section 113(f)(1)'s savings clause.[14] No rational observer could contend that through SARA Congress sought to cut *back* on the right of PRPs that voluntarily remediate contaminated sites to recover their response costs under CERCLA.

D. Aviall's Suit Does Not Create Anomalies In CERCLA's Liability Scheme.

Cooper and the government suggest that affording Aviall a right to sue in these circumstances would create anomalies in CERCLA's liability framework. These arguments simply do not withstand scrutiny.

1. *Double Liability*: The government contends that permitting PRPs to recover voluntarily incurred cleanup costs

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[13] It may well be, as Cooper contends, that in enacting Section 113(f)(1) "Congress' concern was not with . . . direct cost recovery actions [under Section 107(a)] . . . but rather was with the separate line of cases . . . that had specifically found an implied right of contribution under section 107(a)." Cooper Br. at 24 n.18. But if that were so, Aviall's suit can and should proceed independently under Section 107(a).

[14] The court of appeals stated that Section 113(f)(1) was enacted to confirm that the lower courts "had been right" to afford voluntary PRPs a contribution right in these circumstances. Pet. App. 26a.

would expose other potentially responsible parties to the possibility of double liability. *See* U.S. *Amicus* Br. at 28. The scenario evidently envisioned by the government would involve a suit by the EPA under Section 107(a) against a PRP that already had been sued by a voluntary remediator. According to the government, such a follow-on suit by the EPA could subject the target PRP to "double liability."

This argument is meritless and confuses the two types of liabilities created by Section 107(a). In the scenario contemplated by the government, the first suit by a PRP against another PRP would be for the response costs incurred in the voluntary remediation. Neither party in that circumstance could plausibly claim to have litigated or resolved any liability *to the United States*. Were the government to initiate an enforcement action, it invariably would involve the claim that the *United States* incurred response costs in connection with the site—either because it engaged in cleanup directly or for some other reason. No "double liability" can exist in these circumstances because the government would be seeking to resolve liabilities owed to it, rather than the liabilities owed by the defendant PRP to the voluntary remediator. Moreover, a follow-on suit by the United States inevitably would involve the claim that the initial voluntary cleanup activities were not sufficient to remedy the hazardous release. No "double liability" can exist where the government seeks to recover the costs of completing an inadequate cleanup.

2. *Statute of Limitations*: Both Cooper and the government contend that Congress did not intend for CERCLA to afford PRPs the right to recover voluntary cleanup costs because Section 113(g)(3) does not provide a statute of limitations to govern such claims. *See* Cooper Br. at 31-32; U.S. *Amicus* Br. at 22. This argument is misplaced, however, because the express terms of Section 113(g)(2) provide the statute of limitations for Aviall's suit. Section 113(g)(2) states that "[a]n initial action for recovery of the costs referred to in section 107 must be commenced, for a removal action, within 3 years after completion of the removal action . . . and for a remedial action, within 6 years after initiation of

physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2). Because there have been no government enforcement proceedings in this case, Aviall's suit is the "initial action for recovery" of response costs under Section 107 and is therefore governed by the statute of limitations in Section 113(g)(2). *See Sun Co.*, 124 F.3d at 1192 ("Nothing in [Section 113(g)(2)'s] language . . . excludes a contribution action, which also seeks to recover an equitable portion of 'costs referred to' in § 107, provided that particular contribution action is the 'initial action' to recover such costs.").

Moreover, the absence of an express statute of limitations is "a void which is commonplace in federal statutory law." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (internal quotation marks and citation omitted). Indeed, many comprehensive federal statutes lack an express limitations period. *See, e.g., id.* at 266 (42 U.S.C. § 1983); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146 (1987) (RICO); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983) (LMRA). Accordingly, even if Section 113(g)(2) were not applicable to Aviall's claim, the absence of an express statute of limitations governing contribution actions by voluntary remediators would say nothing about whether Congress intended to authorize such suits.

3. *The Contribution Protection Scheme*: Equally unavailing is the contention that suits by voluntary remediators would eviscerate CERCLA's contribution protection for parties that settle with the government. Section 113(f)(2) provides that a person who has entered into a settlement with the United States or a State is not subject to contribution claims for matters covered in the settlement. 42 U.S.C. § 9613(f)(2). This provision operates to bar contribution actions otherwise saved by Section 113(f)(1)'s savings clause, just as it precludes contribution actions independently authorized by the first sentence of Section 113(f)(1). Accordingly, the fact that Aviall's claim is preserved by the savings clause does not threaten the protection that CERCLA gives to parties that settle with the government.

4. *Equitable Apportionment of Response Costs*: Cooper and the government also intimate that suits by voluntary remediators would frustrate Congress's desire to have response costs allocated equitably. But a voluntary remediator could not use a cost-recovery claim as a means of shifting more than its equitable share of the response costs to other parties, given that contribution actions (including those saved by Section 113(f)(1)) are governed by equitable principles. Lest there be any doubt, a defendant could file a counterclaim—as Cooper did in this case—or implead additional parties. *See Amcast*, 2 F.3d at 748 (a PRP that "has been sued is entitled to seek, by way of counterclaim, contribution from the plaintiff for the amount of response costs fairly attributable to the conduct of the plaintiff as distinct from that of the defendant"). There accordingly is no danger that Cooper will be saddled with a greater proportion of the cleanup costs than is equitable under the circumstances.

E. A Contrary Rule Would Undermine CERCLA's Remedial Scheme And Effectively Immunize The Federal Government From Substantial CERCLA Liability.

The foregoing discussion demonstrates that it is the position advanced by Cooper and the government—and not by Aviall—that would lead to anomalous outcomes and create untoward incentives under CERCLA. The rule advocated by Cooper and the government would impede CERCLA's twin aims by discouraging voluntary cleanups and hampering efforts to apportion response costs among PRPs in an equitable fashion. It also would penalize companies that are currently engaged in the voluntary remediation of hazardous waste by denying them the opportunity to recover a portion of their costs from other responsible parties. And it would effectively immunize the federal government from its share of CERCLA liability at the many sites that are now being remediated on a voluntary basis.

1. The rule proposed by Cooper and the government would introduce mischief into CERCLA's remedial scheme. In particular, the rule would unaccountably reward recalcitrant parties that refuse to comply with federal abatement orders and punish companies that comply *ab initio* with such orders by depriving them of contribution rights. This result would clearly undermine CERCLA's objective of encouraging prompt and voluntary cleanup.

The most basic and fundamental weapon available to the federal government to compel cleanup under CERCLA is an abatement order under Section 106. *See* 42 U.S.C. § 9606(a). Under the position espoused by the government, a party that *voluntarily* complied with such an order would have *no* contribution rights against other PRPs to recover a portion of its response costs. This is because the enabling clause of Section 113(f)(1) refers to a "*civil action* under section 106," and the issuance of an administrative order alone does not constitute such an action. The government itself—and the dissenters below—recognize as much. *See* U.S. *Amicus* Br. at 22 n.11 ("EPA's issuance of a Section 106(a) administrative order does not generally entitle the recipient to seek contribution under Section 113(f)(1)."); Pet. App. 36a n.34 (Garza, J., dissenting) ("§ 113 permits contribution actions following an administrative remedial order only when the government files suit in federal court under § 106 to enforce the order.").

By contrast, under Cooper's theory, a party whose refusal to comply with a Section 106 abatement order induced the federal government to sue to enforce that order *would* have contribution rights available to it. That cannot be correct. When Congress enacted SARA, it could not possibly have intended to deprive responsible corporate citizens of contribution rights while rewarding recalcitrant parties with them. But that is precisely the consequence that would flow from the position advanced by Cooper and the government.

2. The rule espoused by Cooper and the government also would undermine CERCLA's key aims by deterring voluntary cleanups. Private companies that are currently en-

gaging in the voluntary remediation of sites in reliance upon their presumed right to file suit thereafter to recover a portion of their expenses would be unable to recoup cleanup costs unless a Section 106 or Section 107(a) action were initiated against them or they reached a settlement with either the United States or a State. Under such a framework, PRPs would understandably be reluctant to incur further voluntary response costs because "[w]ithout the benefit of section 107(a)(4)(B), any responsible person who voluntarily comes forward to cleanup a site would be subjected to liability for the entire clean-up cost." *New Castle County*, 642 F. Supp. at 1264-65. Indeed, "[i]t is not hard to imagine that such a system would discourage voluntariness but would instead invite responsible individuals to adopt a 'wait and see' attitude." *Id.* at 1264-65; *see also* Pet. App. 88a (Wiener, J., dissenting) ("[Cooper's position] encourages PRPs to postpone, defer, or delay remediation and to 'lie behind the log'").

3. The federal government also stands to gain a tremendous windfall. The federal government is itself a PRP at numerous sites throughout the country and would effectively be given a veto over the right of other PRPs to seek contribution from it if the decision below were reversed.

The federal government faced $307 *billion* in environmental liabilities at the end of fiscal year 2001. *See* Gen. Accounting Office, *Long-Term Commitments: Improving the Budgetary Focus on Environmental Liabilities* (GAO-03-219) (2003). At the end of fiscal year 2002, 158 of the 1,233 sites included on CERCLA's National Priorities List—a listing of the Nation's most-contaminated sites—were owned or operated by the United States. *See* Gen. Accounting Office, *Superfund Program: Current Status and Future Fiscal Challenges* (GAO-03-850) (2003).

In light of these staggering liabilities, the federal government has pursued a litigation strategy in which it has advocated conflicting legal theories in an apparent effort to minimize its exposure under CERCLA. For example, in *Centerior Service*, the government sought to persuade the

court that actions for joint and several liability cannot be brought by PRPs against other PRPs because *contribution* claims are available to such parties. 153 F.3d 344. As part of its presentation, the government adopted a number of positions that are diametrically opposed to the arguments it makes here:

- The government argued that Section 113(f)(1) does *not* limit PRPs to pursuing contribution actions "during or following" Section 106 or 107(a) civil actions. U.S. Br. at 28, *Centerior* (No. 97-3163). Instead, it contended—as Aviall does here—that Section 113(f)(1)'s enabling clause is *not* restrictive and that the plain language of the savings clause permits contribution even in the *absence* of an underlying civil action. *Id.* at 28-29. According to the government, any contrary construction "would not only read out the last sentence of CERCLA Section 113(f)(1), but it would also dramatically alter the common law by requiring liable parties to bring joint and several liability actions and barring their actions in contribution." *Id.* at 29.

- The government argued that, under the accepted definition of the term, a settlement or a judgment is not a prerequisite to a "contribution" action. *Id.* at 30.

- The government contended that the language of Section 113(f)(1)'s enabling clause was satisfied "because plaintiffs' action arises under CERCLA section 107 in the first instance, [and thus] the contribution action is itself 'during' a CERCLA section 107 action." *Id.* at 29 n.29. Under this reasoning, Aviall's contribution claim also has been brought "during" a Section 107(a) action and thus

> comports with the "during or following" limitation in Section 113(f)(1)'s enabling clause.

Having successfully persuaded the *Centerior* court to hold that Section 107(a) actions for joint and several liability are not available to PRPs, the government now seeks to preclude PRPs from recovering voluntarily incurred cleanup costs through the very *contribution* mechanism it identified and endorsed in that case—and in many others.[15]

The government stands to receive an extraordinary windfall under this rule. At any site at which the federal government is a PRP, no private party would be authorized to initiate a contribution claim against it in the absence of a CERCLA enforcement action brought by the federal government or a State. Because it is rare for state regulators to file suit under CERCLA, rather than relying upon state-law remedies, such a rule effectively hands the federal government the keys to its own CERCLA liability and would afford the government the power to avoid any liability by declining to initiate enforcement actions.

This rule is wholly inconsistent with Congress's clear intent that the United States be treated under CERCLA just like any private party. *See* 42 U.S.C. § 9620(a) ("Each department, agency, and instrumentality of the United States . . . shall be subject to . . . this Act in the *same manner and to the same extent*, both procedurally and substantively, *as any*

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15 *See, e.g.*, U.S. *Amicus* Br. at 3-4, *Akzo Coatings* (No. 92-3820) (CERCLA "authorizes private persons to bring actions to recover response costs which they incur at a site, whether those actions are taken under compulsion by EPA *or voluntarily*. 42 U.S.C. § 9607(a)(4)(B).") (emphasis added); U.S. Reply Br. at 20, *In re Reading*, 115 F.3d 1111 (3d Cir. 1997) (No. 95-1987) ("Contrary to Reading's belief, the United States does not argue that a Section 113 contribution claim arises only when the government brings an enforcement action;" rather, such a claim arises upon the PRP's "payment of response costs"); U.S. *Amicus* Br. at 18-19, *Pinal Creek* (No. 96-16334) ("[W]hether a party has cleaned up voluntarily or pursuant to a judgment . . . or settlement is irrelevant to whether an action lies in contribution.").

nongovernmental entity, including liability under section 107 of this Act.") (emphases added). The lower courts are unanimous in the view that the waiver of sovereign immunity in CERCLA Section 120 was designed to put private parties and the government on an equal footing. *See, e.g.*, *FMC Corp. v. Dep't of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994) ("when the government engages in activities that would make a private party liable if the private party engaged in those types of activities, then the government is also liable [under CERCLA]") (emphasis omitted).

4. This consequence also puts the asserted availability of state-law contribution claims into appropriate perspective. Cooper and the government make much of the fact that state-law contribution actions provide an alternative means for PRPs to recover voluntary remediation costs. That alternative is more theoretical than real. As an initial matter, substantial questions exist with respect to whether such claims are preempted by CERCLA. *See Bedford Affiliates v. Sills*, 156 F.3d 416, 426-27 (2d Cir. 1998) (CERCLA preempts state-law contribution and restitution claims); *In re Reading*, 115 F.3d at 1117 (state-law contribution claims preempted). Even if such state-law claims are not preempted, they are of little use against the United States, which has asserted—and will undoubtedly continue to assert—that sovereign immunity bars such claims. *See OSI, Inc. v. United States*, 285 F.3d 947, 953 (11th Cir. 2002) (holding that waste disposal decisions constitute discretionary functions that involve an element of judgment or choice and therefore are subject to the discretionary function exception to the Federal Tort Claims Act); *Aragon v. United States*, 146 F.3d 819, 827 (10th Cir. 1998) (same).

5. Finally, a contrary result would upset a decade's worth of settled expectations about how CERCLA operates. Since CERCLA's enactment, it has been widely accepted that the statute affords a contribution right to voluntary remediators. The United States has repeatedly and consistently endorsed that view in the lower courts. *See, e.g.*, U.S. *Amicus* Br. at 3-4, *Akzo Coatings* (No. 92-3820); U.S. Reply

Br. at 20, *In re Reading* (No. 95-1987); U.S. *Amicus* Br. at 18-19, *Pinal Creek* (No. 96-16334). As the court of appeals recognized, despite the millions of dollars at stake and the resources and legal sophistication available to CERCLA's repeat players, the prevailing understanding has been so firmly entrenched that few parties have ever *contended* that voluntary remediators lack contribution rights. *See* Pet. App. 29a ("The absence of direct precedent is like the dog that didn't bark."). In reliance on these background contribution rules, countless companies have formulated business plans, entered into acquisitions, accepted government contracts, and initiated voluntary cleanup activities. To undermine the foundation on which these arrangements have been built—when such a result is contrary to the text, purpose, and legislative history of the statute—would be unjustified, unwise, and unfair.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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April 8, 2004